



**U.S. COMMODITY FUTURES TRADING COMMISSION**

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Division of Clearing and Risk  
Market Participants Division

**To: Derivatives Clearing Organizations, Futures Commission Merchants, Joint Audit Committee Members, and Market Participants**

**Subject: Extension of Time-Limited No-Action Position with Respect to the Treatment of Separate Accounts by Futures Commission Merchants**

On July 10, 2019, the Division of Clearing and Risk (DCR) and the Division of Swap Dealer and Intermediary Oversight<sup>1</sup> (together, the Divisions) issued CFTC Letter 19-17, “Advisory and Time-Limited No-Action Relief with Respect to the Treatment of Separate Accounts by Futures Commission Merchants.” Letter 19-17 provided “guidance regarding CFTC Regulation 1.56(b)<sup>2</sup> and time-limited no-action relief regarding Regulation 39.13(g)(8)(iii)<sup>3</sup> as these rules relate to the treatment of separate accounts of the same customer, a beneficial owner.” Letter 19-17 stated that the no-action relief regarding Regulation 39.13(g)(8)(iii) “will extend until June 30, 2021, in order to provide Staff with time to recommend, and the Commission with time to determine whether to conduct, and if so, to in fact conduct, a rulemaking to implement appropriate relief on a permanent basis.”

On September 15, 2020, the Divisions issued CFTC Letter 20-28, “Supplemental Advisory and Time-Limited No-Action Relief with Respect to the Treatment of Separate Accounts by Futures Commission Merchants.” Letter 20-28 provided further time-limited no-action relief, further interpretation of Regulation 1.56, and, as relevant here, extended the expiration of the conditional and time-limited no-action relief regarding Regulation 39.13(g)(8)(iii) until December 31, 2021.

In Letter 20-28, the Divisions noted that “[i]f the process described above – *i.e.*, for Staff to recommend, and the Commission to determine, whether to conduct, and if so, to in fact conduct, a rulemaking to implement appropriate relief on a permanent basis – is not completed by that date, the Divisions will consider further extension of this timeframe.”<sup>4</sup>

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<sup>1</sup> The Division of Swap Dealer and Intermediary Oversight has since been re-designated as the Market Participants Division (MPD).

<sup>2</sup> 17 C.F.R. 1.56(b).

<sup>3</sup> 17 C.F.R. 39.13(g)(8)(iii).

<sup>4</sup> CFTC Letter 20-28 at page 4.

Because it appeared that this process would not be completed by December 31, 2021, on December 15, 2021, the Futures Industry Association (FIA) requested that the Divisions extend the timeframe for at least nine months, on the grounds that the futures commission merchants

(FCMs) have widely implemented the practices described in the relief, and both FCMs and customers continue to rely on the relief. The Divisions agreed that the rationale for granting the relief remained relevant, and that it was appropriate to extend the deadline in order to provide further time for the Commission to consider whether and, if so, how to codify the relief. Accordingly, on December 21, 2021, the Divisions issued CFTC Letter 21-29, which extended the conditional no-action relief with respect to Regulation 39.13(g)(8)(iii) until September 30, 2022.

On April 1, 2022, FIA requested that the Divisions recommend that the Commission propose for comment amendments to its rules to codify the time-limited and conditional no-action relief with regard to Regulation 39.13(g)(8)(iii). On August 25, 2022, FIA requested that the Divisions further extend the conditional no-action relief with respect to Regulation 39.13(g)(8)(iii) until the earlier of (a) September 30, 2023 or (b) the effective date of any Commission final action on any recommendation that the Divisions may make to codify such relief.<sup>5</sup> On September 15, 2022, the Divisions issued CFTC Letter 22-11, which extended the conditional no-action relief with respect to Regulation 39.13(g)(8)(iii) until the earlier of September 30, 2023 or the effective date of any final Commission action relating to Regulation 39.13(g), in order to provide further time for staff to consider FIA's April 1, 2022 request and for the Commission to consider codification of the relief.

On April 14, 2023, the Commission published a notice of proposed rulemaking proposing to codify in Part 39 of the Commission's regulations, with modifications, the no-action position in Letter 19-17.<sup>6</sup> The comment period, which was extended once, closed on June 30, 2023.<sup>7</sup> Although the proposed regulation mirrored Letter 19-17 in providing that DCOs may permit FCM clearing members to engage in separate account treatment provided such clearing members complied with certain risk-mitigating conditions, six commenters supported re-proposing the proposed regulation in Part 1 of the Commission's regulations, contending, among other things,

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<sup>5</sup> FIA in its April 1, 2022 request stated its "understand[ing] that the Divisions are currently developing such a recommendation to present to the Commission for its consideration," and the fact that "the Commission will not have an opportunity to consider and complete final action on this recommendation before the expiration of the no-action relief on September 30, 2022."

<sup>6</sup> Derivatives Clearing Organization Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants, 88 FR 22934 (Apr. 14, 2023).

<sup>7</sup> Derivatives Clearing Organization Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants, 88 FR 39205 (June 15, 2023).

that the risk-mitigating conditions should be applied directly to FCMs and that separate account treatment should be available for non-clearing FCMs.<sup>8</sup>

On August 9, 2023, FIA submitted to staff of the Divisions a letter requesting further extension of the no-action position in Letter 19-17 until the earlier of June 30, 2024 or Commission final

action on any recommendation that the Divisions may make to codify such relief. FIA noted that, based on their analysis of the comments received, they understand that more time will be needed to codify the relief in Letter 19-17 and that the rulemaking process will extend beyond September 30, 2023. FIA further noted that extending the current relief will maintain the status quo until the Commission has had an opportunity to consider and act on the Divisions' recommendation.

The Divisions are preparing to recommend that the Commission re-propose the proposed regulation in Part 1 in response to comments received. Such a re-proposal would necessarily address how the re-proposed regulation would interact with the existing requirements under Regulation 39.13(g)(8)(iii). The Divisions agree that it is appropriate to extend the deadline in order to provide further time for staff to develop and for the Commission to consider the re-proposal, and, if such a re-proposal is approved, to receive and consider the comments thereon and to consider and adopt a final rule.

Accordingly, the conditional no-action relief with respect to Regulation 39.13(g)(8)(iii) is now further extended until the earlier of (a) June 30, 2024 or (b) the effective date of any final Commission action relating to Regulation 39.13(g).<sup>9</sup> For the avoidance of doubt, this temporal extension of the no-action relief is the sole purpose of this letter.

This Letter, and the position taken herein, represent the views of DCR and MPD only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission.<sup>10</sup> The no-action relief set forth in Letter 19-17, as modified by Letter 20-28, Letter 21-29, and Letter 22-11, and as further extended by this Letter, does not excuse persons

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<sup>8</sup> CME Group, the Futures Industry Association, Intercontinental Exchange, Inc., the Joint Audit Committee, the National Futures Association, and the Asset Management Group of the Securities Industry and Financial Markets Association supported codification in Part 1. These commenters represented half of all comments received, and other commenters did not opine on the location of the proposed codification.

<sup>9</sup> Given that Regulation 39.13(g)(8)(iii) applies, in terms, directly to derivatives clearing organizations, we urge self-regulatory organizations to take similar action with respect to the application to separate accounts of their rules pursuant to Regulation 39.13(g)(8)(iii), to the extent necessary (if any) to provide an analogous extension. In that connection, this extension of relief is a response, pursuant to Commission Regulation 140.99, 17 C.F.R. 140.99, to FIA's request that the relief be extended. See Joint Audit Committee Regulatory Alert 20-02, <http://www.jacfutures.com/jac/jacupdates/2020/jac2002.pdf>.

<sup>10</sup> See 17 CFR 140.99(a)(2) ("A no-action letter binds only the issuing Division... and not the Commission or other Commission staff.").

relying thereon from compliance with any other applicable requirements contained in the CEA or in Commission Regulations.

Questions regarding this advisory and no-action relief can be directed towards Robert B. Wasserman, Chief Counsel, Division of Clearing and Risk, [rwasserman@cftc.gov](mailto:rwasserman@cftc.gov), or (202) 418-5092, or Daniel O’Connell, Special Counsel, Division of Clearing and Risk, [doconnell@cftc.gov](mailto:doconnell@cftc.gov), or (202) 418-5583.

/s/\_\_\_\_\_

**M. Clark Hutchison**

**Director**

/s/\_\_\_\_\_

**Amanda L. Olear**

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